

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

APPEAL NUMBER _____

74-1388

B
Pgs
0

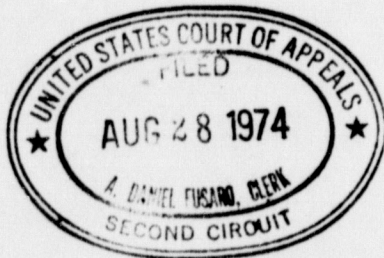
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee

-vs-

CIRILO FIGUEROA, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (74 CR 18)



For the Appellant

Cirilo Figueroa, In Propria Persona
United States Penitentiary
P.M.B. - 70584-158
Atlanta, Georgia 30315

TABLE OF CONTENTS

	<u>PAGE</u>
SUPPLEMENT TO BRIEF FILED BY APPOINTED COUNSEL-----	3
PRELIMINARY STATEMENT-----	3
STATEMENT OF FACTS-----	3
QUESTIONS PRESENTED-----	4
CONCLUSION-----	12
CERTIFICATE OF SERVICE BY MAIL-----	13

TABLE OF CASES

Anders vs. California, 386 U.S. 738-----	3
Mooney vs. Holohan, 294 U.S. 103-----	5
Napue vs. Illinois, 360 U.S. 264-----	5
Brady vs. Maryland, 373 U.S. 83-----	5
Giglio vs. United States, 405 U.S. 150-----	6
Brock vs. North Carolina, 344 U.S. 424-----	6
Wolf vs. Colorado, 338 U.S. 25-----	6
Mapp vs. North Carolina, 344 U.S. 424-----	6
Hammond packing Company vs. Arkansas, 212 U.S. 322-----	6
United States vs. Moreton, 25 F.R.D. 262-----	7
People vs. Braune, 363 Ill. 551, 2 N.E. 2d 839-----	7
State vs. Echeles, 352 F.2d. 892-----	7
United States vs. Falcone, 109 F.2d 579, 581-----	7
Gruewald vs. United States, 353 U.S. 391, 404-----	7
Direct Sales Co. vs. United States, 319 U.S. 703, 711-----	7
Kotteakso vs. United States, 328 U.S. 750-----	8
United States vs. Agueci, 310 F.2d. 817, 826-----	8
United States vs. Varelli, 407 F. 2d. 735, 741-42-----	9
Blumenthal vs. United States, 332 U.S. 539, 558-----	9
United States vs. Bynum, 485 F.2d. 490-----	10
Morey vs. Commonwealth, 108 Mass. 12 Browne 433-----	11
Ex. Parte Nielson, 131 U.S. 176, 187-188-----	11
Carter vs. McClaughry, 183 U.S. 367, 395-----	11
Burton vs. United States, 202 U.S. 344, 381-----	11
Gavieres vs. United States, 220 U.S. 338, 342-----	11
Ebeling vs. Morgan, 237 U.S. 625, 630, 631-----	11
Blockburger vs. United States, 284 U.S. 299, 404-----	11
United States vs. Kramer, 289 F. 2d. 909, 913-----	11
United States vs. Farinas, 308 F. Supp. 459, 462-----	12
United States vs. Sabella, 272 F. 2d 206, 212-----	12

SUPPLEMENT TO BRIEF FILED BY APPOINTED COUNSEL

On July 11, 1974, JOSEPH I. STONE, ESQ., 277 Broadway, New York, New York 10007, filed a Brief pursuant to Anders vs. California, 38 6 U. S. 738, and raised basically the same issues that the appellant will raise in this supplement.

PRELIMINARY STATEMENT

The appellant, Cirilo Figueroa, brings this appeal from a judgment of the United States District Court, Southern District of New York, in which he, and eight (8) co-defendants were found guilty before the Honorable CHARLES M. METZNER, United States District Judge, with a jury, of violations of Title 21 United States Code, Sections 173 and 174, and conspiracy to violate these sections 18 United States Code 371. The appellant was sentenced to eight years imprisonment, commencing upon the expiration of the present five (5) year term imposed on February 24, 1972, by the Honorable DAVID N. EDELSTEIN, Chief Judge, Southern District of New York.

STATEMENT OF FACTS

Appellant and twenty other persons were indicted in August, 1973, indictment number 73 Cr. 950, and charged in a seventeen (17) count indictment with substantive and conspiracy counts concerning narcotic violations that occurred from March through June of 1970. A subsequent indictment, 74 Cr. 18, was filed in January, 1974, with the same offenses charged, but to conform to the existing Rules of

this Circuit. During the course of the trial appellant, through counsel submitted a motion claiming double jeopardy, arising from the 1972 conviction that charged appellant with the sale of heroin on February 19, and March 25, 1970, this being the present sentence the appellant is now serving (71 Cr. 1167). The Court denied the motion.

The appellant would join in the questions raised in the Anders brief of his attorney, however, would place the additional issue of his being placed in Jeopardy two times for the same offense.

QUESTIONS PRESENTED

- (1) WAS THIS SELECTIVE AND UNFAIR PROSECUTION?
- (2) WAS THERE AN ABUSE BY THE COURT IN INTERPRETING RULES 8 AND 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE?
- (3) WAS IT ERROR TO ADMIT IN EVIDENCE NARCOTICS SEIZED FROM THE GOVERNMENT WITNESSES?
- (4) WERE THERE MULTIPLE CONSPIRACIES CONTRARY TO KOTTEAKOS VS. UNITED STATES?
- (5) WAS THE APPELLANT PLACED IN JEOPARDY TWICE FOR THE SAME OFFENSE, CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

QUESTION I - WAS THIS SELECTIVE AND UNFAIR PROSECUTION?

A United States Attorney, in a criminal prosecution carries a double burden, owing an obligation to the government to conduct his case zealously, and owing an obligation of fairness to the accused. In the instant prosecution, both the Court and the United States Attorney permitted, by inference, the jury to consider that the appellant was involved in a continuing large scale operation of distribution of mass amounts of narcotics, by permitting the actual perpetrators of the acts to testify as to their complicity in the movement of over 1,000 Kilos of narcotics, so that they could influence the jury that the appellant was a major participant in the operation, and then in return for the testimony, giving consideration in the sentencing of NOA, ARENAS, RODRIGUEZ and GONZALEZ. This selective type of prosecution is contrary to the Due Process clause of the Constitution of the United States. The real prejudice occurs in a situation like this is where the Government knowingly permits the misrepresentation as to the extent of complicity by permitting the testimony of the main conspirators, relating to their overall participation in their extensive operation to be presented, in return for leniency. Possibly the Government might contend that NOA, ARENAS, RODRIGUEZ and GONZALEZ'S testimony, in return for leniency in their sentences was fully disclosed to the jury and their ~~major~~ obligation was ended when they made this known during the course of the trial, however, the full disclosure of the extent of the Government's promise would, in the instant case, be an absolute necessity, less than a full disclosure, falls short of the "rudimentary demands of justice". Monney vs. Holohan, 294 U.S. 103 (1935); Napue vs. Illinois, 360 U.S. 264 (1959); Brady vs. Maryland, 373 U.S. 83 (1963). It, of course, has been held that in order

to obtain a reversal on the grounds of suppression of evidence, the evidence suppressed must be material and probative. Giglio vs. United States, 405 U.S. 150 (1972). In the instant case, the government suppressed probative evidence by not only failing to disclose the full "arrangements" made with the "key witnesses", but also chose who they were going to prosecute to the full extent. Had such a full disclosure been made in the instant case, and had the disclosure been fully made to the jury, that jury, any jury, would have returned a different verdict.

As stated in Napue vs. Illinois, supra..:

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of witness' testimony in testifying falsely that a defendant's life or liberty may depend."

The guarantees of due process of law is one of the most important to be found in the Federal Constitution, or any of the amendments; it has been described as the very essence of ordered justice. Brock vs. North Carolina, 344 U.S. 424 (1953); Wolf vs. Colorado, 338 U.S. 25 (1949), overruled on other grounds, Mapp vs. North Carolina, 344 U.S. 424 (1953); the fundamental guarantee of due process is absolute and not merely relative. Hammond Packing Company vs. Arkansas, 212 U.S. 322 (1909).

QUESTION 2. - Was there an abuse by the Court in interpreting Rule 8 and 14 of the Federal Rules of Criminal Procedure?

Rule 8, stipulates as to how a defendant may be joinded, and Rule 14, States:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses.....***In ruling on a motion by a defendant for severance the Court may order the attorney for the

government to deliver to the Court in camera any statements or confessions made by the defendants or confessions made by the defendants which the government intends to introduce as evidence at the trial."

It has been held in cases where severance was granted that:

".....because the number of defendants or the complexity of the evidence as to the several defendants is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant, eg. United States vs. Moreton, 25 F.R. D. 262 (W.D.N.Y. 1960); because the defendants have antagonistic defenses, e.g. People vs. Braune, 363 Ill. 551, 2 N.E. 2d 839 (1936); and because it would otherwise be impossible to call a co-defendant as a witness for the purpose of getting into evidence the co-defendant's prior statements holding the other defendant blameless, as in State vs. Echelas, 352 F. 2d 892 (7th Cir. 1965).

Conspiracy indictments for this type of peripheral activity are' precisely the sort for which the courts have shown concern.

"The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in a doctrine is very plain, and it is only by circumventing the scope of such all comprehensive indictments that they can be avoided." United States vs. Falcone, 109 F. 2d 579 581 (2nd Cir.), aff'd 311 U.S. 205 (1940).

The Supreme Court of the United States stated in Grunewald vs. United States, 353 U.S. 391 404 (1957):

"Prior cases in this court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."

See also the Court's warning in Direct Sales Co. vs. United States, 319 U.S. 703, 711 (1943):

"charges of conspiracy are not to be made out by piling inference upon inference thus fashioning a dragnet to draw in all substantive crimes."

QUESTION 3. Was it error to admit in evidence narcotics seized from the government witnesses?

The government's introduction of evidence primarily a co-defendant (and a severed defendant), was prejudicial to the appellant and brought before the jury intentionally to permit the jury to infer that this appellant was a part of the evidence produced against other defendants, thereby, causing a fair trial and a just verdict to be impossible.

QUESTION 4: Were there multiple conspiracies contrary to Kotteakso vs. United States?

There were two or more distinct and separate conspiracies in the instant case, and the Court, in permitting two separate conspiracies, contrary to Kotteakso vs. United States, 328 U.S. 750, gave the jury the typical "Pinkerton charge", which was prejudicial to this appellant.

The clear import of the Government's testimony, if believed, was that various of the defendants were involved in at least two separate and distinct conspiracies. The Court erred and prejudiced the appellant by refusal to grant motions for judgment of acquittal, or for a new trial, because of the prejudicial variance between the indictment and proof and the misjoinder of two distinct conspiracies, and the Court's failure to instruct the jury on the question of whether more than one conspiracy had been proved. In the instant case the government charged that the various violations occurred in March through June of 1970, and this appellant had already been convicted in a prior indictment with the sales of the same heroin on February 19th and March 25, 1970, therefore there was an overlapping of charges, and as this instant case was a typical "chain conspiracy", and as the Court held in United States vs. Agueci, 310 F. 2d 817, 826 (2d Cir. 1962):

"The 'chain' conspiracy has as its ultimate purpose the placing of the forbidden commodity into the hands of the ultimate purchaser....(I)t is dictated by a division of labor at the various functional levels--exportation of the drug from someplace and importation into the United States, adulteration and packaging, distribution to reliable sellers, and ultimately the sale to the narcotics user.."

The last link, however, occurred in and through June, 1970, having been conducted from March, 1970, however, this chain had already been overlapped by the conviction of this appellant on the alleged sales on February 19th and March 25th, 1970 in Criminal Case 71 Cr. 1167.

In order to ascertain whether the proof has shown one conspiracy or more than one, the unlawful agreement must be analyzed. "Agreement is the primary element of a conspiracy.....In essence, the question is what is the nature of the agreement." United States vs. Varelli, 407 F. 2d 735, 741-42 (7th Cir. 1969). If there is one overall agreement among various persons to perform different functions in order to carry out the objectives of the conspiracy, the agreement constitutes a single conspiracy. However, if various persons conspire with a common conspirator with no overall goal or common purpose, then there are separate conspiracies. Id at 742. The distinction is between an agreement or agreements "directed to achieving a single unlawful end or result" and separate agreements each having their "own distinct, illegal end." Blumenthal vs. United States, 332 U.S. 539, 558 (1947).

In Varelli, the defendants were convicted of a single conspiracy to hijack interstate shipments of merchandise, carry it away, and distribute it. Because the evidence showed that one of the hijackers was "a single transaction with a single purpose," the Court held that "there was insufficient evidence from which the jury could find a single overall conspiracy." Id. at 744. Likewise in Kotteakos vs. United States, supra, the landmark

multiple-conspiracy case, reversal was ordered since there was no overall goal or common purpose. Concedely, the facts in Kotteakos are quite different from those here; the Kotteakos conspiracy is the "circle" or "wheel" type, as distinct from the "chain" conspiracy. The principles nonetheless are the same.

This Court, in United States vs. Bynum, 485 F. 2d 490 (Cir. 2d 1973), considered the issue of multiple conspiracies, in regard to a narcotic prosecution on pages 495 and 496. In considering this issue of a single conspiracy, this Court divided the defendants as a group into the following tiers: Bynum and Cordovano, were found to have financed the venture and procured the supplies of raw narcotics; the defendants Birnbaum and other named defendants, noted on page 495, were held to be members of an overall arrangement because they supplied the narcotics and anticipated the resale by the wholesalers at "tremendous" profits.

This Court further considered the defendants named on page 496 of the opinion and these were held to be members of a unitary group because they participated in the processing and distribution of the drugs, understanding the roles of Bynum and his suppliers. By contrast with this case, the facts in Bynum showed a dependency of each group of defendants on the other, all having a common stake in the success of the scheme.

Here the evidence showed that the appellant had no stake in the success of the venture. The core group dealing with the other retailers, were members of an overall conspiracy because this is what they intended. But the retailers it is submitted were not members of one overall conspiracy. See 61 California Law Review, supra, at page 1148.